

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GREGG A. BELL

Claimant

VS.

TYPED LETTERS CORPORATION

Respondent

AND

CONTINENTAL WESTERN INSURANCE COMPANY

Insurance Carrier

Docket No. 1,020,602

ORDER

Respondent and its insurance carrier appealed the March 6, 2006, Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on June 6, 2006.

APPEARANCES

Michael Snider of Wichita, Kansas, appeared for claimant. Nathan D. Burghart of Lawrence, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an August 30, 2003, injury, which was caused when claimant reached into a printing press to clear a paper jam. In the March 6, 2006, Award, Judge Barnes found claimant's accidental injury arose out of and in the course of his employment and that claimant did not willfully fail to use a safeguard. After considering the functional impairment opinions provided by three physicians, Judge Barnes was persuaded by the rating from Dr. Terrence Pratt, the court-appointed independent medical examiner, and concluded claimant sustained a 41 percent functional impairment to his left upper extremity.

Accordingly, the Judge awarded claimant permanent disability benefits under the schedule of K.S.A. 44-510d for a 41 percent functional impairment at the level of the forearm.

Respondent and its insurance carrier contend Judge Barnes erred. They argue claimant willfully failed to use a safeguard and that his injury resulted from such failure. More specifically, they contend claimant violated a safety rule by reaching his arm into the press while raising a pallet to off-load the printed materials. Next, they argue that claimant failed to use a safeguard by reaching into the press before removing his right hand from the machine's control panel, which would have stopped the pallet from rising.

Consequently, respondent and its insurance carrier request the Board to deny claimant's request for workers compensation benefits. In the alternative, they contend claimant's functional impairment is 15 percent to the hand, rather than 41 percent to the forearm found by the Judge. Therefore, respondent and its insurance carrier request the Board to either deny benefits or reduce claimant's permanent disability benefits.

Conversely, claimant contends the Judge's findings should be affirmed. Claimant argues the evidence does not establish that he willfully failed to use a safeguard. And claimant agrees with the extent of functional impairment found by the Judge.

The issues before the Board on this appeal are:

1. Did respondent and its insurance carrier prove claimant's accident resulted from a stubborn, headstrong refusal to use a guard or protection furnished by the respondent?
2. If not, what is the extent of claimant's permanent functional impairment?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

There is no dispute that on August 30, 2003, claimant's left arm was impaled when he reached into a printing press to clear some paper. As claimant reached into the delivery area of the press where printed materials are stacked, his left arm was caught between a metal prong, which was part of the machine's back guide, and a pallet that he was raising to off-load paper. In short, claimant's left wrist was impaled on the metal prong. Claimant attributes the accident to hurrying to begin a printing job.

Claimant began working for respondent approximately three weeks before the accident. When the accident occurred, claimant was helping another pressman who was

training claimant how to operate that particular press. During his 30 years working as a pressman, claimant had not operated any other press with a similar type of back guide. Most other presses, according to claimant, have a moveable plate, rather than fixed metal prongs, that the operator lifts to clear a jam.

The press in question did not have a guard to prevent an individual from reaching into the machine where the printed materials are stacked. But claimant had been instructed not to reach into the machine while he was raising the pallet. In addition, the machine had a control panel that would stop a pallet from ascending or descending whenever the operator removed his right hand from that panel.

Unfortunately, claimant's accident occurred when he failed to remove his left arm before the pallet rose into position to off-load paper from the machine. And respondent and its insurance carrier now contend that claimant's accident occurred due to his willful failure to use a guard or protection.

K.S.A. 44-501(d)(1) provides:

If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

And "willful" as used in the above statute, contemplates an element of intractableness or stubborn refusal to abide by instructions regarding safety rules or the use of guards or safety devices.¹ Moreover, once a worker meets the burden of proving the right to workers compensation benefits, the burden of proving a defense shifts to the employer.²

Assuming the control panel was a "guard or protection against accident" as contemplated by K.S.A. 44-501(d)(1), the Board concludes respondent and its insurance carrier have failed to prove that claimant's conduct comprised a willful failure to use that device. The evidence establishes claimant was merely negligent. There is little, if anything, to establish that claimant's accident resulted from stubbornness or intractable conduct. Conversely, the evidence establishes that claimant's accident occurred when he became careless while rushing to ready the press to print a job. Accordingly, the Board affirms the Judge's finding that claimant was entitled to receive workers compensation benefits for his August 30, 2003, accident.

¹ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

² *Poole v. Earp Meat Co.*, 242 Kan. 638, 750 P.2d 1000 (1988).

Following the accident, claimant underwent three surgeries to his wrist and hand to repair the lacerations to the ligaments and median nerve. Claimant testified his thumb, index finger and middle finger are now numb, despite those operations. And he also testified he now experiences pain and numbness from the site where he was impaled, which he describes as being approximately one inch above his hand, down into those same three fingers.

Although there is no dispute that claimant was impaled above his wrist, respondent and its insurance carrier argue claimant's impairment is limited to his left hand and, therefore, his permanent disability benefits under K.S.A. 44-510d should be based upon the schedule for a hand injury. Conversely, claimant argues his permanent disability should be based upon the schedule for a forearm injury as he has lost some range of motion in his left wrist.

The record contains three expert medical opinions regarding the extent of claimant's permanent impairment. Dr. Prince Chan, the orthopedic surgeon who twice operated on claimant's left wrist to repair lacerated tendons and a lacerated median nerve, testified claimant sustained a 15 percent left upper extremity impairment based upon the *AMA Guides*³ (4th ed.). The doctor, who last saw claimant in late August 2004, testified in part:

The functional impairment probably would not change because that was based on -- the textbook we use, it's a guide, and I have to put in a lot of, you know, factors in there that's not in the guide. It's, you know, he had a previous surgery, the tendon is involved, how he's feeling, how is he moving? The book is a good guide, but it's not all complete.⁴

Dr. Chan found no impairment in claimant's wrist. Moreover, the doctor felt claimant's impairment was limited to his left hand despite the fact that one of the severed tendons he repaired, the flexor carpi radialis (FCR) tendon, is a wrist tendon. Despite the statement that he found no impairment in claimant's wrist, the medical records introduced into evidence do not show that Dr. Chan ever measured the range of motion in claimant's wrist.

In February 2005, at claimant's attorney's request, claimant saw Dr. P. Brent Koprivica. As a result of that examination the doctor determined claimant sustained a 46 percent functional impairment to his left hand. Dr. Koprivica, however, later received a report from Dr. Terrence Pratt, whom the Judge requested to evaluate claimant after the parties selected him to provide an independent medical evaluation, that caused Dr. Koprivica to amend his initial report. When Dr. Koprivica considered Dr. Pratt's finding that

³ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁴ Chan Depo. at 12.

claimant had lost some palmar flexion, Dr. Koprivica increased his functional impairment rating to a 42 percent impairment to the left upper extremity. In his July 27, 2005, report, Dr. Koprivica noted:

I would note that in my prior evaluation, I assigned a forty-six (46) percent hand impairment.

Dr. Pratt assigned a forty-five (45) percent hand impairment.

In looking at these assigned impairments, referring to Table 2 on Page 19 in the American Medical Association, "Guides to the Evaluation of Permanent Impairment", Fourth Edition, a forty-five (45) percent as well as a forty-six (46) percent hand impairment converts to a forty-one (41) percent upper extremity impairment.

I did not specifically assign impairment based on loss of wrist motion. On Dr. Pratt's evaluation, there was loss of palmar flexion measured at 50 degrees. As an additional consideration for impairment, the loss of wrist palmar flexion would represent an additional two (2) percent upper extremity impairment from Figure 26 on Page 36.⁵

According to Dr. Koprivica, he did not measure claimant's palmar flexion when he evaluated claimant in February 2005. And following that examination, the doctor believed claimant's impairment was limited to his left hand. The doctor testified, however, that it made sense claimant suffered some loss of range of motion in his wrist as he had severed the FCR tendon.

As indicated above, the Judge requested Dr. Pratt to evaluate claimant's injuries. The doctor examined claimant in early July 2005 and determined claimant sustained a 45 percent impairment to his left hand that converted to a 41 percent impairment to the left upper extremity as measured by the AMA *Guides* (4th ed.). The doctor noted in his July 5, 2005, report that claimant had a mild limitation in left wrist flexion. But the report is not clear whether the doctor believed that loss of flexion represented either a permanent injury or a permanent impairment to claimant's wrist. In addition to the loss of wrist flexion, Dr. Pratt found that claimant had hypersensitivity overlying the healed wound on the volar surface of the mid wrist and other symptoms into the left medial forearm.

The Board is persuaded Dr. Pratt's and Dr. Koprivica's ratings better reflect the impairment that claimant sustained due to this accident. Accordingly, the Board adopts the Judge's finding that claimant sustained a 41 percent functional impairment to his left upper extremity. Likewise, the Board concludes claimant is entitled to receive permanent disability benefits under the schedule of K.S.A. 44-510d(a)(12) for the forearm.

⁵ Koprivica Depo., Ex. 3.

Nevertheless, the Award should be modified. The parties stipulated claimant's average weekly wage was sufficient for the maximum weekly compensation rate, or \$440.⁶ But in computing the Award the Judge used two-thirds of \$440 for the weekly compensation rate.

AWARD

WHEREFORE, the Workers Compensation Board modifies the March 6, 2006, Award to correct the award of disability benefits.

Gregg A. Bell is granted compensation from Typed Letters Corporation and its insurance carrier for an August 30, 2003, accident and resulting disability. Mr. Bell is entitled to receive 82 weeks of permanent partial disability benefits at \$440 per week, or \$36,080, for a 41 percent permanent partial disability, making a total award of \$36,080, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael Snider, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁶ R.H. Trans. at 5.